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NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GRETCHEN HEINRICH,

Plaintiff,

v.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA and KNIGHT-RIDDER, INC.  
LONG TERM DISABILITY PLAN,

Defendants.

Case Number C 04-02943 JF

ORDER<sup>1</sup> (1) GRANTING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT (2)  
DENYING DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT, AND  
(3) REMANDING CASE FOR  
DETERMINATION OF BENEFITS

[Docket Nos. 17, 23]

Plaintiff Gretchen Heinrich ("Heinrich") and Defendants The Prudential Insurance Company of America and Knight-Ridder, Inc. Long Term Disability Plan (collectively "Defendants") dispute whether Heinrich properly was denied long-term disability benefits. The parties have filed cross-motions for summary judgment. The Court has read the moving and responding papers and has considered the oral arguments of counsel presented on July 15, 2005. For the reasons set forth below, Heinrich's motion for summary judgment will be granted, Defendants' motion for summary judgment will be denied, and the case will be remanded to Defendants for determination of benefits in accordance with the findings and conclusions set

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<sup>1</sup> This disposition is not designated for publication and may not be cited.

1 forth herein.

## 2 I. BACKGROUND

3 Heinrich, a former employee of Knight-Ridder, Inc. (“Knight-Ridder”), was a participant  
 4 in the Knight-Ridder, Inc. Long Term Disability Plan (“Plan”). The Plan offers long-term  
 5 disability benefits to employees through an insurance policy issued by The Prudential Insurance  
 6 Company of America (“Prudential”). Prudential also functions as the claims administrator. This  
 7 action, brought pursuant to the Employee Retirement Income Security Act of 1974 (“ERISA”),  
 8 29 U.S.C. §§ 1001 *et seq.*, arises out of Heinrich’s allegation that Prudential improperly denied  
 9 her claim for long-term disability benefits.

10 Heinrich was employed by Knight-Ridder as an office systems manager responsible for  
 11 general maintenance of the computer network system. *See* Silver Decl., Ex. 4. Heinrich’s last  
 12 day of work was August 7, 2002. She stopped working due to stress, depression, and the effects  
 13 of fibromyalgia. The American College of Rheumatology describes fibromyalgia as “a common  
 14 condition that is associated with widespread aching, stiffness and fatigue, and originates in  
 15 muscles and soft tissue.” Silver Decl., Ex. 23. According to the Arthritis Foundation, other  
 16 symptoms include sleep disorders, irritable bowel syndrome, chronic headaches, and cognitive or  
 17 memory impairment. *See* Silver Decl., Ex. 20. Heinrich had been diagnosed with fibromyalgia  
 18 in 2000.

19 On February 23, 2003, Heinrich filed a claim for long-term disability benefits under the  
 20 Plan. *See* Silver Decl., Ex. 2. The Plan provides that “[y]ou are disabled when Prudential  
 21 determines that . . . you are unable to perform the *material and substantial duties* of your  
 22 *regular occupation* due to your *sickness* or *injury*.” Silver Decl., Ex. A2 at 12. “Material and  
 23 substantial duties” are defined as duties that “are normally required for the performance of your  
 24 regular occupation” and “cannot be reasonably omitted or modified.” *Id.* “Regular occupation”  
 25 is defined as “the occupation you are routinely performing when your disability begins” and is  
 26 based on how the occupation “is normally performed instead of how the work tasks are  
 27 performed for a specific employer or at a specific location.” *Id.* The Plan requires that the  
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1 claimant be “continuously disabled” for an “elimination period” of 180 days before she is eligible  
2 to receive benefits. *Id.* at 13.

3 As part of her claim, Heinrich submitted, among other things, a medical report from her  
4 primary care physician, Dr. Rakesh Chaudhary, M.D. (“Chaudhary”), dated February 28, 2003.  
5 In this report, Chaudhary made a primary diagnosis of fibromyalgia and a secondary diagnosis of  
6 depression. *See* Silver Decl., Ex. 8. Chaudhary noted that Heinrich was experiencing “lots of  
7 pain from fibromyalgia with severe sleep disturbance” and characterized Heinrich’s functional  
8 abilities as “sedentary.” *Id.* In a follow-up report dated March 10, 2003, Chaudhary added that  
9 Heinrich “cannot concentrate on work tasks due to severe sleep disturbance [and] depression.”  
10 Silver Decl., Ex. 9. On May 1, 2003, Prudential Claim Manager Susan Williams (“Williams”)  
11 prepared a “SOAP Note” summarizing Heinrich’s medical history as reported by her treating  
12 physicians and analyzing her claim for benefits. *See* Silver Decl., Ex. 11. The “SOAP Note”  
13 described Heinrich’s condition from August 9, 2002, to January 16, 2003, including her disturbed  
14 sleep patterns, and listed the prescription medications she was taking. *See id.* On May 6, 2003,  
15 Williams prepared another “SOAP Note,” in which she concluded that the medical information  
16 in Heinrich’s file “does not support continuous disability through [the elimination period] of  
17 8/8/02 through 2/4/03 for depression or [fibromyalgia] flare.” *Id.* Prudential denied Heinrich’s  
18 claim on May 13, 2003. *See* Silver Decl., Ex. 12. The denial letter stated that “the current  
19 medical documentation in file [sic] does not support that the severity of your conditions rendered  
20 you unable to perform the material and substantial duties of your regular occupation throughout  
21 the elimination period” and that Heinrich “should have been able to perform the duties of [her]  
22 regular occupation with reasonable self-accommodations or modifications during the elimination  
23 period.” *Id.* It addressed both Heinrich’s fibromyalgia and her psychiatric conditions,  
24 concluding that there was insufficient evidence to support Heinrich’s claim for disability as a  
25 result of either condition.

26 Heinrich appealed the denial of her claim on November 3, 2003. *See* Hanna Decl., Ex. A  
27 at PRU0339-63. As part of her appeal, Heinrich submitted several additional reports regarding  
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1 her conditions. Jeff Beeman (“Beeman”), a self-titled “vocational expert,” interviewed Heinrich  
2 on September 10, 2003. *See* Silver Decl., Ex. 6. Based on that interview, Heinrich’s medical  
3 record, and various occupational references, Beeman concluded that

4 Ms. Heinrich’s physical, mental and cognitive problems, including fatigue,  
5 weakness, insomnia, depression, severe pain, inability to do physical labor, and  
6 difficulty with concentration, presents [sic] an individual unable to perform the  
7 material and substantial duties of her regular occupation. Ms. Heinrich is simply  
8 not able to sustain on a full time basis work activities at any exertional level with  
any reasonable continuity. Based on the totality of medical records reviewed, Ms.  
Heinrich is not employable in her own occupation or in any occupation, at any  
skill or exertional level at this time.

9 *Id.* at 10. Beeman characterized Heinrich’s job as “high stress and physically demanding,”  
10 requiring “high level sophisticated skills and physical demands along with high aptitudes.” *Id.* at  
11 9. In response, Prudential Claim Manager Thomas Virgilio (“Virgilio”) prepared a “SOAP  
12 Note” dated December 3, 2003, in which he concluded that Beeman’s characterization of  
13 Heinrich’s job was accurate but distinguished what Heinrich actually did from how the  
14 occupation normally is performed, noting that the latter is the relevant inquiry under the Plan.  
15 *See* Silver Decl., Ex. 26. By Virgilio’s analysis, Heinrich’s occupation necessitated only “light  
16 work” in the areas of lifting, carrying, pushing, and pulling, and her actual physical activities in  
17 “mov[ing] equipment, crawl[ing] under desks, etc. . . . would not be considered material and  
18 substantial.” *Id.*

19 Heinrich also was examined by Dr. Oscar Abeliuk, M.D. (“Abeliuk”), a neurologist, who  
20 conducted a neurological consultation on September 11, 2003. *See* Silver Decl., Ex. 13. Abeliuk  
21 diagnosed Heinrich with (1) chronic fibromyalgia syndrome according to the criteria established  
22 by the American College of Rheumatology, (2) “chronic pain syndrome, sleep disturbance and  
23 chronic spinal pain,” and (3) a “history of significant depression and anxiety as well as other  
24 psychological difficulties.” *Id.* at 9. Abeliuk concluded that Heinrich had “significant residual  
25 functional capacity problems . . . as documented not only on a subjective basis but also on her  
26 clinical evaluation,” noting that, “although at one point in the past she was able to work despite  
27 her fibromyalgia, she has noted significant worsening,” which is “true in many patients with  
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1 fibromyalgia, despite treatment.” *Id.* at 10. He also stated that “[a]ll of these significant residual  
2 functional capacity difficulties . . . secondary to her fibromyalgia are clear-cut impairments for  
3 her to return to [her] job.” *Id.*

4 On September 17, 2003, Dr. L. Neena Madireddi, M.D. (“Madireddi”), a specialist in  
5 physical medicine and rehabilitation, examined Heinrich and noted “multiple fibromyalgia tender  
6 spots” and “active trigger points” throughout the body. Silver Decl., Ex. 15 at 5-6. Madireddi  
7 also tested Heinrich’s range of motion and evaluated her tenderness, sensitivity, and reflexes at  
8 various points on the body. Based on the physical examination and a review of Heinrich’s  
9 medical record, Madireddi described her “impression” of fibromyalgia, lumbar strain, carpal  
10 tunnel syndrome, migraine headaches, and “history of attention deficit activity disorder.” *Id.* at  
11 7. Madireddi concluded that “Ms. Heinrich can not [sic] return to her prior line of work as an  
12 office system manager,” that “she cannot concentrate on the tasks at hand [and] will be  
13 constantly bothered by such severe pain that she cannot work in a typical work day,” and that  
14 “she is incapable of even a low stress job.” *Id.*

15 On October 14, 2003, Dr. Alfred Scopp, Ph.D (“Scopp”), a licensed psychologist,  
16 prepared a neuropsychological report on Heinrich based on four examinations of her verbal and  
17 cognitive abilities. *See* Silver Decl., Ex. 17. Scopp conducted a number of neuropsychological  
18 tests to evaluate Heinrich’s verbal skills, recall ability, speech and language functioning, and  
19 motor functioning, as well as to test whether Heinrich was malingering. The tests revealed  
20 impairment in memory and recall ability. Scopp stated that “there is clear evidence of major  
21 verbal impairment on the Verbal Memory Scale of the Memory Assessment Scale. . . . [H]er  
22 Verbal Memory is . . . at the 6<sup>th</sup> percentile.” *Id.* at 8. Thus, Scopp concluded that “it would be  
23 impossible for her to assimilate and remember new technical information required of her job . . . .  
24 She would also have difficulty understanding her own notes of things to do, remember,  
25 understand and respond to e-mail requests from other employees, of which she receives many per  
26 day.” *Id.* at 9.

27 Finally, in a letter dated October 20, 2003, Chaudhary reiterated that the “manifestations  
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1 [of Heinrich's fibromyalgia] . . . make it impossible for her to function in her usual job. She is  
2 unable to concentrate on complex tasks . . . [and] her severe sleep disturbance precludes her  
3 ability to stay on a work schedule of any type." Silver Decl., Ex. 18.

4 In processing Heinrich's appeal, Prudential arranged for Dr. Douglas Martin, M.D.  
5 ("Martin"), who is board certified in occupational and environmental medicine, and Dr. Carroll  
6 Brodsky, M.D. ("Brodsky"), who is board certified in psychiatry, to evaluate Heinrich's claim.  
7 See Silver Decl., Exs. 28, 29, 39. Based upon a review of Heinrich's record, Martin concluded  
8 that "the medical documentation presented does not support an ongoing claim for long-term  
9 disability as a result of fibromyalgia." Silver Decl., Ex. 28 at 8. He explained that

10 [t]here is very little if any objective information contained within the medical  
11 report presented that shows any effect with respect to function from the standpoint  
12 of range of motion, strength, or cardiovascular problems. Rather, what I see  
13 throughout the medical records presented are claims of subjective difficulties such  
14 as pain, anxiety, difficulty coping, difficulty with stress at the job, and difficulty  
15 sleeping.

14 *Id.* Martin also objected to the conclusions drawn by Heinrich's physicians on the grounds that  
15 (1) Abeliuk's report revealed "no recorded abnormality with respect to weakness of the  
16 musculature" and "seems to mix the terms 'tender' and 'trigger' when he talks about girdle  
17 musculature as well as other muscles identified," *id.* at 5, (2) Madireddi's report did not list  
18 specific degree values associated with range of motion but rather described the range of motion  
19 in relation to "what is 'expected of normal,'" *id.* at 6, (3) Madireddi used an "invalid test" to  
20 evaluate muscular strength, *id.*, (4) Madireddi's report did not "address the typical 18 tender  
21 points that the American College of Rheumatology considers in this diagnosis," *id.*, (5) Scopp  
22 failed to administer a particular neuropsychological test and instead used a "relatively poor test,"  
23 *id.*, and (6) the reports of Heinrich's psychologists or psychiatrists were "somewhat difficult to  
24 interpret," due in part to "handwriting quality," *id.* Martin expressed his belief that Heinrich  
25 "would have much more of a significant psychological or psychiatric problem than she would  
26 with the fibromyalgia." *Id.* at 9. He also acknowledged an "increased association" between  
27 fibromyalgia and "psychiatric difficulties such as depression and anxiety" without concluding  
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1 that there is a causal relationship between the two. *Id.* Finally, he questioned whether Heinrich's  
2 treatment had been adequate or appropriate and suggested that having Heinrich "resume normal  
3 activities including that of work" would constitute treatment that is "just as important as any  
4 medication or rehabilitation program" for fibromyalgia. *Id.*

5 Brodsky agreed with Martin's conclusion that "fibromyalgia does not explain all of  
6 [Heinrich's] symptoms, the pattern of her symptoms, the duration of her symptoms, or the  
7 distribution of her physical symptoms." Silver Decl., Ex. 29 at 3. Brodsky stated that "there is  
8 no evidence that [Heinrich] has a physical disorder that is producing the level of disability that  
9 she describes." *Id.* Further, Brodsky concluded that, "[f]rom a psychiatric standpoint alone,  
10 except for her belief that she is unable to function and would be unable to function, there is no  
11 evidence that she would be unable to do the job that she did formerly." *Id.* Brodsky suggested  
12 that Heinrich may have an aversion to returning to her job because of a stressful relationship with  
13 her former supervisor and stated that there also may be "some disorganizing or obtunding  
14 effects" from Heinrich's medication. *Id.* at 4.

15 In response, Madireddi and Scopp prepared reports contesting the accuracy of Martin's  
16 and Brodsky's conclusions and reaffirming their respective opinions on Heinrich's condition.  
17 See Silver Decl., Exs. 30, 33. Abeliuk issued a similar report with respect to Martin's  
18 conclusions. See Silver Decl., Ex. 31. On February 5, 2004, Dr. Charles Casella, M.D.  
19 ("Casella"), a specialist in psychiatry and neurology, performed a psychiatric evaluation of  
20 Heinrich and concluded that she is "disabled for competitive employment by a combination of  
21 her psychiatric and physical disorders" and that "[h]er fibromyalgia disorder has exacerbated her  
22 preexistent depression." Silver Decl., Ex. 32. Casella noted, however, that Heinrich's  
23 "depression in and of itself would likely not be work-disabling." *Id.* He also refuted Brodsky's  
24 conclusions, remarking that "there is, in fact, a wealth of data which indicates that [Heinrich]  
25 does have multiple physical disorders" and that "her emotional and psychiatric disorders . . .  
26 interact with her physical disorders in a vicious cycle." *Id.*

27 On March 14, 2004, Heinrich was awarded disability benefits from the Social Security  
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1 Administration (“SSA”). *See* Silver Decl., Ex. 34. The award letter states that the SSA “found  
2 that [Heinrich] became disabled under [their] rules on August 8, 2002,” *id.*, the day after her last  
3 day of work. However, there is no evidence in the record as to the SSA’s guidelines for  
4 determining disability or the documents that the SSA relied upon in reaching its conclusions.

5 In a “SOAP Note” dated April 27, 2004, Prudential Claim Manager Jill Fallon, M.D.  
6 (“Fallon”) concluded, based on a review of the medical record, that Heinrich’s condition was not  
7 disabling. Fallon agreed with Martin’s conclusion that “there is little if any objective evidence”  
8 to support a finding that Heinrich was incapable of performing “a light or medium duty job.”  
9 Silver Decl., Ex. 35. Fallon further stated that Heinrich “appears to have personality traits  
10 resulting in strong orientation toward physical illnesses and somatic explanations of her  
11 difficulties with pain, weakness and fatigue beyond medical expectations for her current physical  
12 status” but that “these [difficulties] are not disabling.” *Id.* Fallon suggested that external  
13 stressors, such as difficulty with a new supervisor, may have prompted Heinrich’s physical  
14 complaints, and she noted that Heinrich had worked for years in spite of many of her symptoms.  
15 *See id.*

16 On May 24, 2004, Prudential denied Heinrich’s appeal. *See* Silver Decl., Ex. 39. The  
17 denial letter concluded, based on the findings in the reports of Martin, Brodsky, and Fallon, that  
18 the

19 [m]edical documentation reviewed does not support that there has been a change  
20 in Ms. Heinrich’s long-standing condition(s) with which she has worked in the  
21 past. Professional opinions regarding Ms. Heinrich’s disability status that  
22 [Heinrich has] submitted on appeal are based on her self-reported symptoms and  
not on objective findings, such as decreased range of motion and/or strength or  
significant findings of cognitive dysfunction.

23 *Id.* The denial letter also summarized the findings of the various medical reports submitted by  
24 Heinrich and referred Heinrich to her copies of Martin’s and Brodsky’s reports for “more  
25 detailed information.” *Id.* Prudential primarily relied on Martin’s report to conclude that  
26 Heinrich was not disabled from a physical standpoint and on Brodsky’s report to conclude that  
27 Heinrich was not disabled from a psychiatric standpoint.



## II. LEGAL STANDARDS

### A. Standard for Summary Judgment

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Material facts are those that might affect the outcome of the case under the governing law. *Anderson*, 477 U.S. at 248. There is a genuine dispute about a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The moving party bears the initial burden of informing the Court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the party moving for summary judgment would bear the burden of proof at trial, it has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case. *C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the ultimate burden of persuasion at trial, it must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

If the moving party meets its initial burden, the burden shifts to the nonmoving party to present specific facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324. The nonmoving party may not rely on the mere allegations or denials in its pleading in order to preclude summary judgment. Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 248. The evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Summary judgment thus is not appropriate if the nonmoving party presents evidence from which a reasonable jury could resolve

1 the material issue in its favor. *Anderson*, 477 U.S. at 248-49; *Barlow v. Ground*, 943 F.2d 1132,  
2 1134-36 (9th Cir. 1991).

### 3 **B. Standard of Review for Denial of Benefits**

4 A denial of benefits challenged under 29 U.S.C. § 1132(a)(1)(B) is reviewed under a de  
5 novo standard unless the benefit plan gives the administrator discretionary authority to determine  
6 eligibility for benefits or to construe the terms of the plan. *Firestone Tire & Rubber Co. v.*  
7 *Bruch*, 489 U.S. 101, 115 (1989). The default is that the administrator has no discretion, and the  
8 administrator has to show that the plan gives it discretionary authority in order to get any judicial  
9 deference to its decision. *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1089 (9th Cir. 1999).  
10 The presumption of de novo review can be overcome only when a plan's reservation of  
11 discretion is unambiguous. *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1107 (9th Cir. 2000).  
12 Where the benefit plan does give the administrator such discretion, a deferential standard of  
13 review is appropriate. *Firestone Tire & Rubber Co.*, 489 U.S. at 111. The deferential standard  
14 of review is referred to interchangeably as "abuse of discretion" or "arbitrary and capricious,"  
15 both of which have the same meaning in this context. *Hensley v. Northwest Permanente P.C.*  
16 *Ret. Plan & Trust*, 258 F.3d 986, 994 n.4 (9th Cir. 2001).

## 17 **III. DISCUSSION**

18 To determine the appropriate standard of review, the Court must determine whether the  
19 Plan grants Prudential discretionary authority to determine eligibility for benefits or to construe  
20 the terms of the plan. *See Firestone Tire & Rubber Co.*, 489 U.S. at 109. The policy at issue  
21 contains the following language: "You are disabled when Prudential determines that . . . you are  
22 unable to perform the **material and substantial duties** of your **regular occupation**." Silver  
23 Decl., Ex. A2 at 12. Prudential argues that the phrase "You are disabled when Prudential  
24 determines that" constitutes a grant of discretionary authority sufficient to trigger the abuse-of-  
25 discretion standard. It relies on two Ninth Circuit cases to argue that the power to "determine" or  
26 "make a determination" regarding eligibility for benefits constitutes a grant of discretionary  
27 authority. *See Bogue v. Ampex Corp.*, 976 F.2d 1319, 1324 (9th Cir. 1992); *Eley v. Boeing Co.*,  
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1 945 F.2d 276, 278 (9th Cir. 1991). However, both of these cases pre-date *Kearney v. Standard*  
 2 *Insurance Co.*, in which the Ninth Circuit clarified that the grant of discretion must be  
 3 unambiguous in order to trigger the abuse-of-discretion standard. *See Kearney*, 175 F.3d at  
 4 1089.

5 Since *Kearney*, the Ninth Circuit has held that an “allocation of decision-making  
 6 authority . . . is not, without more, a grant of discretionary authority in making those decisions.”  
 7 *Ingram v. Martin Marietta Long Term Disability Income Plan for Salaried Employees of*  
 8 *Transferred GE Operations*, 244 F.3d 1109, 1112-13 (9th Cir. 2001). The *Ingram* court  
 9 emphasized that it is not difficult for insurance companies to use unambiguous language in order  
 10 to retain discretionary authority if they wish to do so and that the absence of such explicit  
 11 language consequently should trigger de novo review. *See id.* at 1114. Thus, in *Ingram*, the  
 12 language “the management and control of the operation and administration of claims procedures  
 13 under the Plan, including the review and payment or denial of claims . . . shall be vested in the  
 14 carrier” was found not to grant unambiguous discretionary authority but merely to “make[] clear  
 15 that [the carrier], rather than the employer or some other party, makes all administrative decisions  
 16 to grant or deny claims.” *Id.* at 1112. In the instant case, this Court similarly concludes that the  
 17 Plan language does not constitute an unambiguous conferral of discretionary authority on  
 18 Prudential,<sup>2</sup> and it notes that other district courts, ruling on plan language identical to the  
 19 language in the instant case, have reached the same conclusion. *See Flores v. The Prudential Ins.*  
 20 *Co.*, No. C-03-5589 MMC, 2004 U.S. Dist. LEXIS 19492, at \*16 (N.D. Cal. Sept. 16, 2004);  
 21 *Urso v. Prudential Ins. Co. of Am.*, No. 03-024-JD, 2004 U.S. Dist. LEXIS 23930, at \*10  
 22 (D.N.H. Nov. 23, 2004). Accordingly, the Court will review the denial of Heinrich’s claim de  
 23 novo.

24 Reviewing the administrative record de novo, the Court must determine whether Heinrich

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 26 <sup>2</sup> The Plan also states that the claimant may be required to send proof of continuing  
 27 disability “satisfactory to Prudential.” Silver Decl., Ex. A2. Because Prudential does not argue  
 28 that such language constitutes a conferral of discretionary authority, the Court does not address  
 this language.

1 was disabled under the terms of the Plan during the elimination period, thus entitling her to  
2 benefits. It is undisputed that Heinrich has fibromyalgia. The parties dispute only whether  
3 Heinrich's fibromyalgia and psychiatric conditions rendered her disabled under the terms of the  
4 Plan. The record contains medical reports from Heinrich's numerous physicians, all of whom,  
5 following a physical or psychiatric examination, have diagnosed her with fibromyalgia and/or  
6 concluded that her condition rendered her unfit to work. Among other things, Heinrich's  
7 physicians specifically have concluded that the chronic pain and severe sleep disturbance  
8 associated with fibromyalgia have prevented Heinrich from being able to function in a normal  
9 work environment or to keep a normal work schedule. In concluding otherwise, Prudential  
10 primarily has relied on the report of its own reviewing physician, Martin, whose main contention  
11 is that there is no objective evidence in Heinrich's file to substantiate the alleged severity of her  
12 condition—only Heinrich's subjective reports of her symptoms. Although Martin's opinion is  
13 not unreasonable in and of itself, the Court does not find it persuasive in light of the record as a  
14 whole.

15 First, although Prudential bases its denial of benefits principally on a lack of objective  
16 evidence of the severity of Heinrich's fibromyalgia claim, the terms of the Plan do not  
17 specifically require "objective" medical evidence as proof of disability. Second, even if the Plan  
18 contained such a requirement, the nature of fibromyalgia—a condition that manifests as what the  
19 Arthritis Foundation describes as "generalized muscular pain," Silver Decl., Ex. 20—is such that  
20 neither its presence nor its severity can be verified by purely objective laboratory tests. The  
21 American College of Rheumatology states that "[d]iagnosis is based on the patient's description  
22 of chronic widespread pain and the finding of tender points at specific locations by a physician"  
23 and that "[t]here are no blood or x-ray tests that are abnormal in fibromyalgia." Silver Decl., Ex.  
24 23. Yet, despite the subjectivity inherent in diagnosing fibromyalgia, which requires patients to  
25 report their own sensations of pain and tenderness, courts have held that claimants were entitled  
26 to disability benefits due to impaired functioning resulting from fibromyalgia. *See, e.g., Lang v.*  
27 *Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc.*, 125 F.3d 794, 799-800 (9th

1 Cir. 1997); *Hawkins v. First Union Corp. Long-Term Disability Plan*, 326 F.2d 914, 919 (7th  
2 Cir. 2003); *Ellis v. Egghead Software Short-Term & Long-Term Disability Plans*, 64 F. Supp. 2d  
3 986, 993-94 (E.D. Wa. 1999).

4 Heinrich's examining physicians noted the presence of these tender points, as well as  
5 Heinrich's complaints of other fibromyalgia-related symptoms, and thus appear to have had a  
6 medically sound basis for their diagnoses and conclusions. In opposition to these findings,  
7 Prudential's physicians primarily asserted that the severity of Heinrich's condition was  
8 substantiated only by self-reported symptoms rather than by objective evidence. However, the  
9 fact that Heinrich's physicians could not use a completely objective test to evaluate the severity  
10 of her fibromyalgia does not undermine their considered medical opinions, based on their in-  
11 person examinations, that her condition rendered her incapable of performing her occupation.  
12 Moreover, Martin's objections to the adequacy of some of the other diagnostic techniques used  
13 by Heinrich's physicians are insufficient to negate the conclusions drawn by Heinrich's multiple  
14 examining physicians, who reaffirmed their medical opinions in response to the reports of Martin  
15 and Brodsky. Of particular significance is the fact that Prudential's physicians never examined  
16 Heinrich or even spoke to Heinrich's physicians. Martin, Brodsky, and Fallon appear to have  
17 concluded that Heinrich was not disabled based only upon a review of the reports by Heinrich's  
18 physicians. Although "plan administrators are not obliged to accord special deference to the  
19 opinions of treating physicians," *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 825  
20 (2003), the failure of Prudential's physicians to perform their own examinations of Heinrich  
21 entitles their opinions to less weight, because fibromyalgia produces symptoms that must be  
22 reported by the patient to the physician and that can be evaluated more fully through an actual  
23 examination than by a mere review of a patient's medical record.

24 In addition to asserting that there is a lack of objective evidence of disability, Prudential  
25 argues that Heinrich's ability to work for several years after being diagnosed with fibromyalgia  
26 demonstrates that her condition was not disabling enough to merit disability benefits. However,  
27 there is sufficient evidence in the record—specifically, the reports of Chaudhary and  
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1 Abeliuk—indicating that Heinrich’s condition worsened around the time she ceased working.  
2 Moreover, a “disabled person should not be punished for heroic efforts to work by being held to  
3 have forfeited his entitlement to disability benefits should he stop working.” *Hawkins*, 326 F.3d  
4 at 918.

5 Finally, in the process of arguing about whether Heinrich was able “to perform the  
6 **material and substantial duties** of [her] **regular occupation**,” Silver Decl., Ex. A2 at 12, the  
7 parties dispute the appropriate characterization of Heinrich’s occupation. Based on Beeman’s  
8 report, Heinrich argues that her position at Knight-Ridder was a hybrid position that  
9 encompassed the responsibilities of a number of occupations as described in various occupation  
10 resource handbooks. *See* Silver Decl., Ex. 6 at 7. Beeman concluded that Heinrich’s position  
11 was best classified as “medium exertional,” occasionally rising to “heavy exertional.” *Id.*  
12 Prudential’s claim manager, Virgilio, acknowledged the accuracy of Beeman’s analysis of the  
13 character of the tasks actually performed by Heinrich but asserted that Heinrich’s occupation, as  
14 normally performed in the market rather than for Knight-Ridder specifically, should be classified  
15 as being in the “light work” range. Silver Decl., Ex. 26. This dispute need not be resolved by the  
16 Court for present purposes, as the reports from Heinrich’s physicians appear to conclude that she  
17 was incapable of performing any duties of her occupation during the elimination period and thus  
18 was disabled under the terms of the Plan, regardless of the specific exertion level required by a  
19 given task. *See* Silver Decl., Exs. 13-19.

20 For the foregoing reasons, the Court concludes, based on a de novo review of the  
21 evidence in the administrative record, that Heinrich was disabled under the terms of the Plan for  
22 the duration of the elimination period and was entitled to disability benefits. The case will be  
23 remanded to Prudential for a determination of the scope of benefits owed to Heinrich in light of  
24 this conclusion. As the Court’s review is limited to decisions actually made by  
25 Prudential—specifically, its conclusion that Heinrich was not disabled during the elimination  
26 period—the Court will not address the parties’ arguments regarding potential limitations on the  
27  
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length of time Heinrich can receive benefits.<sup>3</sup> Such matters properly should be determined by Prudential in the first instance, and Heinrich retains the right to challenge Prudential's decision administratively and, after exhausting her administrative remedies, through the courts. Defendants shall determine the scope of benefits owed to Heinrich within ninety days of the date of this Order, which is the same amount of time provided for a plan administrator to notify a claimant of a benefits determination. *See* 29 C.F.R. § 2560.503-1(f)(1).

At the hearing on the instant motions, Heinrich's counsel requested that, should Heinrich prevail on summary judgment, the time to file a motion for attorney's fees be extended to thirty days. A motion for attorney's fees normally must be filed within fourteen days of entry of judgment, though the time may be extended either by stipulation pursuant to Civil Local Rule 6-2 or by motion pursuant to Civil Local Rule 6-3. Civil L.R. 54-6(a). The Court will act on the request by Heinrich's counsel upon receipt of one of the aforementioned documents.

#### IV. ORDER

Good cause therefore appearing, IT IS HEREBY ORDERED that Heinrich's motion for summary judgment is GRANTED, Defendants' motion for summary judgment is DENIED, and the instant case is remanded for determination of benefits consistent with the findings and conclusions set forth herein.

DATED: July 29, 2005

/s/ electronic signature authorized  
JEREMY FOGEL  
United States District Judge

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<sup>3</sup> For example, the Plan provides that "[t]he limited pay period for self-reported symptoms and mental illness combined is 24 months during your lifetime," Silver Decl., Ex. A2 at 21, and it gives Prudential the right to request proof of continuing disability, *id.* at 25.



1 This Order has been served upon the following persons:

2 Rebecca Labat Crosby crosbyr@wemed.com

3 Beth A. Fruechtenicht Fruechtenichtb@wemed.com

4 Melvyn D. Silver MDSRST@cs.com

5 Ruth Silver Taube  
6 Law Offices of Silver & Taube  
7 300 South First St., Suite 205  
8 San Jose, CA 95113  
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